

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1344

United States Court of Appeals
FOR THE SECOND CIRCUIT

Longest Concealed

Plaintiff-Appellant

against

NEW JERSEY EXPORT MARINE CARPENTERS, INC.

Defendant and Third Party

Plaintiff-Appellee

and

CIA DE NAV. MAR. NUTRIMAR

Defendant and Third Party

Plaintiff-Appellant

against

INTERNATIONAL TERMINAL ORGANIZATION, C.A.T.A.

Third Party Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT AND THIRD-PARTY
PLAINTIFF-APPELLEE, NEW JERSEY EX-
PORT MARINE CARPENTERS, INC.

LARSEN, WICKEN & CHICKER
OF Counsel to Company & Defendant
Attorneys for Defendant and
Third Party Plaintiff-Appellee
New Jersey Export Marine
Carpenters, Inc.

14 Park Place
New York, New York 10007

TABLE OF CONTENTS

	PAGE
Issue	1
Facts	2
POINT I	9
Conclusion	14

TABLE OF CASES

<i>Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.</i> , 369 U.S. 355	13
<i>Cascia v. Maze Woodenware Co., Inc.</i> , 29 A.D. 2d 964	12
<i>Lavender v. Kurn</i> , 327 U.S. 645	13
<i>Swain v. Boeing Airplane Company</i> , 337 F.2d 940, cert. den. 380 U.S. 951	12
<i>Unser v. Luckenbach Overseas Corp.</i> , 400 U.S. 494 ...	13

United States Court of Appeals
FOR THE SECOND CIRCUIT

JOAQUIM CONCEICAO,
Plaintiff-Appellant,
against

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,
Defendant and Third-Party
Plaintiff-Appellee,
and

CIA DE NAV. MAR NETUMAR,
Defendant and Third-Party
Plaintiff-Appellant,
against

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF DEFENDANT AND THIRD-PARTY
PLAINTIFF-APPELLEE, NEW JERSEY EX-
PORT MARINE CARPENTERS, INC.**

Issue

Whether the jury's verdict in favor of New Jersey Export Marine Carpenters, Inc. was supported by the evidence.

Facts

The accident out of which this action arose occurred on November 5, 1970 aboard the S.S. Mosqueiro while berthed at Pier 36. The plaintiff had been working since 8:00 a.m. of that day with seven other longshoremen employees of International Terminal Operating Co., Inc. (hereinafter called ITO) on the main deck between the combing and railing on the port side of hatch number one assisting in stowing pipes being transferred two at a time on the ship's fall by ITO from lighters into a deck crib at that location (A26-27, A30, A40-41).^{*} The pipes were brought over two at a time (A27). The Port Captain employed by the defendant vessel owner (A170-171) testified that this cargo consisted of forty-one pieces of pipes, each forty feet long, with a diameter of eighteen inches and a weight of about 1.40 tons (A180).

The plaintiff stated that at about 10:00 a.m. (A26-27) when he stepped up on the pile of previously stowed pipes to release the fall hooks from two more pipes which had just been landed on top, part of the crib broke and the pipes shifted injuring his foot (A30-31). During the two working hours before the accident, it was attested to by the plaintiff that there had been no break in any of the components of this crib. He also stated that none of the pipes being stowed struck the walls of the crib (A35-36, A48, A74). The plaintiff's hatch boss too, said he had not seen anything wrong with the crib (A86-87, A108) during most of the morning while he was observing the operation (A84, A87, A90). The plaintiff did not actually see the break (A36, A74-75), but his fellow employees told that it was one or more of the uprights which broke at the end of the crib on the hatch combing side where the plaintiff was working (A78, A104-105, A121, A140-141).

^{*} (Figures in parentheses refer to page numbers of Appendix).

Richard Piper did not appear personally on trial but his pre-trial deposition was read into evidence. He testified that he was defendant shipowner's Port Captain on this vessel at this time (A171-172). He had the responsibility for its loading and unloading (A175), to coordinate storage, the ordering of labor and equipment therefor and the overall supervision of the loading operation (A172). In conjunction with the ship's master and chief officer and with the approval of the stevedore, he proposed the stowage plan (A173).

Captain Piper testified on his examination before trial that since he had quite a bit of pipe to stow (A179), some days before this accident (A182) he verbally ordered from New Jersey Export Marine Carpenters (hereinafter called New Jersey Export), through its head foreman William Montella (A201-202), the construction of pipe cribs (A182). Captain Piper stated that he thought he ordered three cribs (A184). The order also included lashing the pipes to be performed by the carpenters after stowage was completed (A183). He said that the material listed on the New Jersey Export labor record was ordered only after consultation by the carpenter foreman with the Port Captain (A321). He admitted that he did not specifically tell Montella that there were 41 pieces of pipe but he said "he gave him full booking of the vessel and left it up to him as to the number of areas he would require to stow it safely" (A185). Since the Port Captain never appeared on trial to explain the term to the Court, the meaning of "full booking of the vessel" is not known. Captain Piper also never testified that he ever told New Jersey Export or its employees of the weight of the pipes to be cribbed. He stated that New Jersey Export would determine the size and location of each bed when he told Montella the number of pieces, the dimensions and length of the pipe (A182-183, A184, A185-186).

William Montella, who did testify on trial, stated that Captain Piper verbally ordered not three but two cribs

(A169, A202, A253). In accordance with direction (A253) the New Jersey Export foreman built these cribs, one on the port and one on the starboard side of Hatch # 1 (A202). He definitely asserted that Piper never told him the number of pipes he had or their weight (A167-168, A252) and that he, Montella, never saw or had access to the stowage plan (A233-234) or the Port Captain's documents (A234-235). Montella stated that the Port Captain would order what he wanted (A234). When one or more pipe beds or cribs were ordered he always built them the same way depending for their size only upon the limitation of the space designated within which to construct the items (A168, A253-254, A255). It was Captain Piper who alone lays out the ship and informed Montella what he wanted done (A170, A234). Montella was not an engineer (A243). ITO's hatch boss stated that it was the stevedore who told him what cargo to put there (A81). In fact, this ITO witness testified that the carpenters, although in the area to lash the pipe on completion of stowing, never said anything to him about loading (A98, A106-107). The ITO maritime expert testified that the ship customarily should detail what it wants from the carpenter and tell that contractor the size and weight of the cargo to be stowed and the carpenter then only orders such men and material as is required to do the job (A375-376).

William Montella testified that in building these cribs New Jersey Export under his direction laid 4 x 6" lengths of lumber on the deck from hatch combing to ship's rail about five feet apart. On either side of those he nailed 4 x 6" uprights with 4 x 6' fillers. Along the base of the uprights for the length of the crib which ran fore and aft of the ship he nailed one 4 x 6" whaler and he nailed another 42 inches above that. The entire structure was tied together by horizontal 2 x 4" or 2 x 10" lumber so that the finished product was firm (A203-204). The witness' description of this structure was substantially confirmed by plaintiff's testimony (A63-67). This witness stated that

he used all new lumber (A204) and he had finished this construction the day before the accident (A204, A235). All witnesses agreed that the crib in issue had been completed and was empty on the morning of the accident (A42, A98, A124-125, A145, A182). Mr. Montella testified that this crib like all the others he fashioned was five feet high (A253). This height of the crib walls was corroborated by the other witnesses (A101-102, A308) with the exception of one witness who testified that the crib walls were about ten feet high (A125-128). With five foot walls, this would leave the top of the crib walls about two to three feet above the combing of the hatch (A51-52, A102, A128).

Captain White, the New Jersey expert witness, testified that the subject crib as built was adequate for its intended purpose to hold a reasonable load (A261-262, A296). Captain Wheeler, ITO's expert, testified that he could not give an opinion one way or the other about the sufficiency of the structure because he felt that he did not have enough details of its structure (A335-336). The ITO expert stated, however, that the crib was correct in appearance and did prove satisfactory during the two or three hours of stowage before the accident (A337). The defendant ship presented no evidence to challenge the propriety of this deck construction. There was not one word said on trial from which a finding could be made other than that the lumber and material used in this crib was of top grade.

One of the plaintiff's witnesses, an experienced long-shoreman (A139), testified that it was the job of the ITO hatch boss to check the crib for adequacy before the long-shoremen loaded into it (A148-152). ITO's hatch boss stated that he did not come to this location until after his gang had started work and there already was pipe in the crib (A84, A87, A108), but he indicated that in his absence someone else would perform the pre-work inspection in his place (A85). The ITO maritime expert testified that after the crib was erected, it was the duty of the ship's personnel

to make a detailed inspection for sufficiency (A331, A370-371). Thereafter, he said, the hatch boss is supposed to make only a visual inspection of the crib and load in it whatever he is told to by the ship foreman or the pier superintendent (A336-337, A338). He testified that the ship had an officer in overall supervision of loading (A384-385). New Jersey Export maritime expert also testified that when the carpenters finish such a crib it is proper procedure that the vessels' officer inspects the product visually and by shaking it to see that it is solidly built (A267-269) and that the stevedore boss then makes a visual and physical inspection (A297-298). He said that the crib installations were subject to ship officers' approval (A267).

The plaintiff's hatch boss testified that it was the stevedore who told him to put that particular cargo in the crib (A81). One of plaintiff's co-workers stated that they just did the work and the stevedore tells how high the pipes are to be piled (A143-144).

The height of the pipe stowed in the crib at the time of the accident, as seen immediate before and after the occurrence, was variously described: by the plaintiff, as less than five feet or about five or six feet (A52); by ITO's hatch boss, as the level of one or two pipes above the top of the hatch combing (A92); by the longshoreman, as six or seven feet above the deck or three or four feet above the hatch combing (A127-128) but not over the walls of the crib (A136); by New Jersey Export's foreman, as being much higher than the top of the walls of the crib (A258) and the ship's Port Captain, as a few inches below the top of the crib walls (A313).

According to one of the plaintiff's experienced longshoremen witnesses, to load pipes above the uprights was bad practice (A113-115). ITO's maritime expert (A334) agreed with this only if the pipes were stowed near the uprights. If pipes were loaded a little above the crib uprights and in the center of the pile, he said, that would be

proper since the pipes would interlock and the only effect would be the added weight exerted horizontally against the walls of the crib (A343). This ITO expert explained that the purpose of the crib is to hold the horizontal weight of the stow until all intended pipes are loaded into it. Then, he stated, they are lashed for the trip and the crib walls are again required to hold the same weight after the lashing is released at the time of unloading until all of the pipes have been removed (A344).

The lashing in this instance consisted of cables laid perpendicular to the pipes and under them. When the stow was completed the ends of these cables were wrapped, tightened and secured around the pipes with turn buckles to contain the package in transit (A207-208, A312).

The New Jersey Export foreman testified that after the accident, he repaired the break, without need for adjusting the load, by putting another 4 x 6 against the broken upright and nailing it in. Then he lashed the pipes and built a catwalk over it (A207-208). This was done after consultation with and at the direction of the ship's Port Captain (A308-309).

The Port Captain was vague in his recollection of conditions or developments at the scene after the accident (A309-310, A312). However, two of the longshoremen witnesses who were present during all the pertinent times testified that after the accident no more pipe was loaded in this crib. Instead, the remaining pipes were stowed on and across Hatch No. 1 to the same height as had been reached in the cribs at the time of the accident (A133, A137, A161).

All motions made at the close of plaintiff's, the ship's and the entire case were denied by the Court (A190-200, A323-332, A391-393). It is interesting to note that the Court, in denying the ship's motion at the end of plaintiff's case, reminded the ship's attorney that there was

no evidence to show that New Jersey Export was ever informed of the weight of the subject pipe and that the testimony given by the ship's Port Captain indicated that he had not even told the carpenters of the number of pipes these cribs were to accommodate (A196-197). No further testimony or other proof was presented by the ship or the plaintiff to supply this weakness in the proof after this shortcoming in their cases was pointed out to them.

In deciding the motions made by New Jersey Export against it at the end of plaintiff's case, the Court ruled that the law of the case would be that New Jersey Export owed the plaintiff the warranty of workmanlike performance and of strict liability since there was an issue that the carpentry contractor could have foreseen that longshoremen would be using the crib constructed by New Jersey Export in the manner in which they did (A192-193). This ruling was excepted to them (A193).

The Court charged the law on the elements of plaintiff's action against the ship and New Jersey Export (A404-420). On the matter of the warranty owed by New Jersey Export to the plaintiff, the Court instructed that this defendant owed the plaintiff the duty to perform its assigned task in a workmanlike manner and to build a reasonably fit and safe pipe bed. Although the Court charged that the plaintiff had the burden of proof in this respect, the jury was also instructed that it was no defense to this cause of action that the plaintiff did not discover or correct the subject crib. The Court said that the plaintiff's claim could be defeated on this issue only if he seriously hampered or hindered New Jersey Export from doing its work properly (A421-422). The Jury was also given the question of whether the ship's conduct prevented New Jersey Export from doing its work in a workmanlike manner (A439).

The only exception to the charge as it referred to New Jersey Export was made by the plaintiff and the ship to

the effect that the instructions of the Court on the issue of New Jersey Export warranty duty to the plaintiff was not strong enough (A448, A450).

The Jury returned findings that New Jersey Export was not negligent in causing plaintiff's accident and that New Jersey Export did not breach its warranty of workman-like performance owed to the plaintiff. Accordingly, a verdict was rendered in favor of New Jersey Export (A463-464).

In its opinion on the post-trial motion of the ship, the Court held that there was ample support for the verdict in favor of New Jersey Export in that there was evidence upon which a finding could be made that the ship's Port Captain did not tell the carpentry contractor how many pipes were to be stowed in this crib at Hatch No. 1 or the weight of pipe the crib would be required to sustain and that the cribs were constructed pursuant to ship's directions with the Port Captain being responsible for the loading (A459).

POINT I

It is respectfully submitted that if selective excerpts from the testimony given on trial are presented out of context, as the appellant ship did in its brief, it might appear that the evidence was contrary to the opinion of the Trial Court as it related to the foundation for the jury's exoneration of New Jersey Export from any fault in the occurrence of the plaintiff's accident. However, it is submitted that the Court's opinion reflects the uncontroverted proof or the overwhelming foundation for its conclusion where there was conflicting evidence.

The ship's Port Captain did testify that he never specifically told New Jersey Export's foreman that there were forty-one pieces of pipe (A185). He never said in any of his testimony that he informed the carpenter foreman what

the weight of the pipes was for which the cribs were to be fashioned. This was so even though the Port Captain's pre-trial deposition revealed that from his examination of the cargo plan at the time (A179), he knew that he had to stow forty-one pipes with an aggregate weight of fifty-seven tons or about 1.4 ton a piece (A180). The Port Captain also said "I believe it was 3" when asked how many cribs he ordered (A184).

On the other hand, the carpentry contractor foreman definitely testified that the Port Captain never told him the number of pipes or their weight (A167-168, A252) and he was not shown the cargo plan or the Port Captain's documents (A234-235). Mr. Montella also catagorically testified that the Port Captain only ordered two cribs which he built as directed, one on each side of Hatch No. 1 (A202, A253).

The defendant shipowner had at its disposal on trial, the daily labor records of New Jersey Export (Plaintiff's Exhibits 5A through F) from which it could have refuted Montella's statement that there were only two cribs ordered by simply computing therefrom the amount of lumber ordered—if those exhibits contained such evidence. After all, the price charged for lumber, nails and labor would have been 50% higher for three pipe cribs than for two. It does not do appellant Netumar's argument on appeal any credit to use the inartful testimony of a carpenter foreman's referring to billing practices and accounting procedures to which he referred only to show that he built only what was ordered, in order to rationalize a spurious contention that the carpentry contractor had *carte blanche* authority in erecting these cribs where there otherwise is no valid evidence to support such a position. Further, the shipowner's attorney was warned by the Court at the end of the plaintiff's case that there was uncontroverted evidence on the record that the Port Captain never told the carpenters the number or weight of the

pipes (A196-197). Yet the ship never produced any proof in its own case to show the contrary. Now in its appellant's brief it wishes this Court to draw speculative inferences to support its conjecture for which it produced no evidence on trial.

Both Captain Piper (A184) and the carpenter foreman (A168, A202, A253-255) agree that these pipe beds are always built the same way. Therefore, it would be the Port Captain, after he evaluates the layout of the ship, who decides and orders the number of cribs depending upon a lesser or a greater volume or weight in the deck cargo he has to have stowed. Otherwise he would have to order the same number but stouter or larger cribs for heavier or more voluminous cargo. Certainly the Port Captain never claimed he ordered stouter or larger cribs here.

There is not one word in the entire transcript of trial from either layman or expert witness that criticized the manner of construction or stability of these pipe cribs as built or the material with which they were constructed.

How then could a jury verdict be challenged which found the obvious that New Jersey Export was not negligent and did not breach any warranty of workmanlike performance since it constructed two solid cribs in accordance with the order and direction it received from the ship's Port Captain?

It must be remembered that there was other evidence which indicates that the ship neglected to order a sufficient number of cribs consistent with the forty-one pieces of pipe each weighing almost a ton and a half. The ITO expert testified that the last two pipes stowed in the subject crib had no other effect than to exert added lateral weight on the walls of the crib (A343). This is an important consideration, since after this accident no more pipes were stowed in the cribs. Instead, they were laid

on top of the hatch cover (A133-134, A137, A161). If sufficient cribs had been ordered to accommodate the deck cargo of pipes, they would not need to be stowed on the hatch.

Accordingly, it cannot be said that there is any showing of an unseaworthy ship occasioned by the presence or construction of these two pipe cribs on the morning of November 5, 1970. The evidence only shows that any danger which caused the plaintiff's accident came into existence thereafter at the moment when the excess weight was applied to the otherwise sound walls of an adequate crib.

The overloading of an adequate crib at the direction of the ship or the use to which the ship later orders a seaworth appurtenance to be put so as to cause the crib to break cannot be retrospectively related to charge with negligence or breach of warranty the ship's carpentry contractor which erected suitable cribs in accordance with direction. At the very least, the jury had more than sufficient basis for forming such a finding.

"However, even under the principle of strict liability the manufacturer is liable only if the plaintiff proves the accident was caused by delivery of the article in a 'defective condition' which is to say not 'safe for normal handling and consumption'. ALI Restatement (Second) Torts § 402 (A)(1) & Comment H (Tent. Draft No. 10, 1964)." *Swain v. Boeing Airplane Company*, 337 F. 2d 940, 942 cert. den. 380 U.S. 951.

"In our opinion, in order for the plaintiff to succeed under either of his causes of action against appellant, it was incumbent upon him to establish that the putlog was in a defective condition on the date it was delivered to his employer, Zeilon (*Natale v. Pepsi Cola Co.*, 7 A.D. 2d 282)." *Cascia v. Maze Woodenware Co., Inc.*, 29 A.D. 2d 964.

Parenthetically, it might be mentioned that the jury could very well have found that the ship and its appurtenances were reasonably safe under *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 and that the accident occurred instantaneously by the stevedore's compliance with the ship's negligent order to add those last two items of overweight to the serviceable deck crib.

The jury found that New Jersey Export was free of negligence and did not breach any warranty. Those findings were overwhelmingly supported by the evidence. No matter what disposition is otherwise made of this action on appeal, the judgment rendered on the verdict to the extent that it affects New Jersey Manufacturing should be affirmed.

"Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender v. Kurn*, 327 U.S. 645, 653.

"But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.'" *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358, 359.

"Where there is a view of the case that makes the jury's answers to special interrogatories consistent,

they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360. Cf. *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446." *id.* p. 364.

CONCLUSION

As to appellee New Jersey Export Marine Carpenters, the judgment should be affirmed.

Respectfully submitted,

LARKIN, WRENN & CUMISKY
Of Counsel to COPPOLA & D'ONOFRIO
*Attorneys for Defendant and
Third-Party Plaintiff-Appellee
New Jersey Export Marine
Carpenters, Inc.*

11 Park Place
New York, New York 10007

United States Court of Appeals for the Second Circuit

Joaquim Conceicao, Plaintiff-Appellant

New Jersey Export Marine Carpenters, Inc., Defendant-Appellee

Cia De Nav. Mar. Netumar, Defendant-Appellant

International Terminal Operating Co., Inc.,

Third Party Defendant-Appellee

State of New York, County of New York, ss.:

Bernard S. Greenberg, being duly sworn deposes and says that he is agent for Larkin, Wrenn & Cumisky counsel to the the attorney s for the above named New Jersey Export Marine Carpenters, Inc. That he is over 21 years of age, is not a party to the action and resides at 162 East Seventh Street, New York, N.Y.

That on the 7th day of June, 1974, he served the within Brief for Defendant and Third Party Plaintiff-Appellee, New Jersey Export Marine Carpenters, Inc.

upon the attorneys for the parties and at the addresses as specified below

Cichanowicz & Callan,
Attorneys for Plaintiff-Appellant,
80 Broad Street,
New York, N.Y.

Baker, Garber, Duffy & Baker,
1 Newark Street,
Hoboken, New Jersey

Alexander Ash Schwartz & Cohen,
801 Second Avenue,
New York, N.Y.

by depositing **three true copies**

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at

90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned,

that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this **7th**

day of **June**, 1974..

Bernard J. Greenberg

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509105

Qualified in Delaware County
Commission Expires March 30, 1975